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Office of Administrative Law Judges
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Issue Date: 04 December 2002

CASE NO.: 2001-LHC-02886

OWCP NO.: 07-154536

IN THE MATTER OF

FLOYD L. MAY,
Claimant

v.

INGALLS SHIPBUILDING, INC.,
Employer

APPEARANCES:

D. JASON EMBRY, ESQ.
On behalf of the Claimant

PAUL B. HOWELL, ESQ.
On behalf of the Employer

Before: LARRY W. PRICE
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (herein the Act), 33 U.S.C. § 901, et seq., brought by Floyd L. May (Claimant) against Ingalls Shipbuilding, Inc. (Employer).

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing. A formal hearing was held in Biloxi, Mississippi, on June 18, 2002. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. The following exhibits were received into evidence:

1. Joint Exhibit 1;
2. Claimant's Exhibits 1-21;band
3. Employer's Exhibits 1-26.

Based upon the stipulations of the parties, the evidence introduced, and the arguments presented, I find as follows:

I. STIPULATIONS

During the course of the hearing the parties stipulated and I find as related to Case No. 2001-LHC-02886:

1. Jurisdiction is not a contested issue.

2. Date of injury/accident: July 19, 1999.

3. An employer/employee relationship existed at the time of the alleged accident.

4. Date Employer advised of injury: July 20, 1999.

5. Date Notice of Controversion filed: March 27, 2001.

6. Date of informal conference: July 11, 2001.

7. (a) Temporary total disability paid: 9/27/99-1/3/00 @ $520.71 per week.
2/1/00-6/1/00 @ $520.71 per week.

   (b) Medical benefits paid: yes.

8. Impairment: 12 1/2% to the body as a whole.

9. Date of maximum medical improvement: May 31, 2000.

II. ISSUES

The unresolved issues in this proceeding are:

1. Nature and extent of disability after March 7, 2001.

2. Average weekly wage.

3. Attorney's fees.

III. STATEMENT OF THE CASE

Claimant's Testimony

Claimant is a sixty-four year old man who resides in Biloxi, Mississippi. (Tr. 8). He has a tenth grade education, and his reading and writing skills are below average. (Tr. 9). He began working for Employer as a painter in March 1977. (Tr. 9). Claimant testified that there are about 650 painters who work for Employer and they do everything from heavy hull painting and cleaning to touch up painting. (Tr. 40). He worked for Employer for nearly twenty-four years, including about four or five temporary layoffs over the years. (Tr. 10). For most of that time, Claimant worked as a painter, although occasionally he did maintenance work as well. (Tr. 10). Claimant never received any warning slips during his years with Employer. (Tr. 50). He retired on March 9, 2001. (Tr. 10).

In 1998, Claimant tripped and fell down some stairs at work, injuring his left shoulder. (Tr. 39). Despite having some pain, he continued to work. (Tr. 39). On July 19, 1999, Claimant reinjured his left shoulder at work. (Tr. 10-11). He was working on a bulkhead and using a buckeye when his foot slipped and he had to grab some scaffolding with his left arm to keep from falling. (Tr. 11). Claimant hung on for about five to ten seconds until he regained his footing on the bulkhead, and he felt a sharp burning pain in his shoulder which did not go away after he released his arm. (Tr. 11-12). Claimant's shift was nearly done, so he went home. (Tr. 12). When he returned the next day, he told his supervisor that he thought his shoulder was badly hurt and was then sent to Dr. William Warfield, the company doctor. (Tr. 12). Dr. Warfield gave Claimant some pain pills and advised him to see another doctor if his shoulder continued to hurt. (Tr. 12). Claimant was placed on light duty and continued to work for about a month after that with no lost time. (Tr. 42).

On August 24, 1999, Claimant went to see Dr. Arthur Black, who took an X-ray and diagnosed Claimant with a pre-existing bone spur. (Tr. 12-13, 42). Dr. Black sent Claimant to get an MRI, which showed a torn rotator cuff in addition to the bone spur, and told Claimant that he was going to need surgery. (Tr. 13, 43). When Claimant returned to work, he was on light duty driving a van to and from the company hospital for a few weeks until an operation could be scheduled. (Tr. 18, 43). Dr. Black had to leave the country, so Claimant was granted permission to see Dr. M.F. Longnecker, an orthopedic surgeon, who performed surgery in September 1999 to repair the rotator cuff and remove the bone spur from his shoulder. (Tr. 14-15, 43-44). After the surgery, Claimant attended physical therapy and was released to light duty on January 3, 2000. (Tr. 15, 45). He worked for a month and then had to undergo a manipulation to bring his arm back into position. (Tr.16, 46). Claimant returned to physical therapy, but his shoulder never fully recovered. (Tr. 16). Dr. Longnecker informed Claimant that there was nothing more that could be done to improve his shoulder and released him on May 31, 2000. (Tr. 16). Dr. Longnecker said that Claimant would have a twenty-five percent disability for the rest of his life and that he would be on permanent restrictions at work, including no overhead work, no repetitive use of the left arm and no lifting over twenty pounds. (Tr. 17, 46).

Claimant returned to work on June 2, 2000. (Tr. 47). Initially, he was working in the shop and on fire watch and was not allowed to go back to the shipyard right away. (Tr. 47). Nonetheless, Claimant earned the same hourly wage and was still able to work overtime, often working six or sometimes seven days a week. (Tr. 48-49). On July 11, 2000, Dr. Longnecker's restrictions on Claimant became permanent, and Claimant went to Internal Placement to inquire about a permanent light duty job in the shipyard. (Tr. 50-51). Melinda Wiley, the employee relations representative, told him that with his restrictions, he did not qualify for any available jobs. (Tr. 28-29). Claimant then went to see Terry Hayes, who got him back on light duty after speaking with his boss. (Tr. 29). According to Claimant, Mr. Hayes told him that he would have to agree to retire on March 14, 2001, in order to keep working in the shipyard. (Tr. 30). Claimant acknowledged that he first asked Mr. Hayes if he could work up until his retirement date but explained that he was afraid to ask if he could work longer and he just wanted to buy some time. (Tr. 52-53). Claimant felt that he had no other choice than to retire when he was told to do so. (Tr. 32). Claimant testified that no one ever offered him work beyond the March 14 date and that he had not planned on retiring until he was at least sixty-five. (Tr. 30). Claimant wanted to work that long so that he could get better Social Security benefits. (Tr. 32).

Claimant was sent to permanent light duty in the shipyard on June 9, 2000, and worked as a service painter. (Tr. 19). Claimant testified that this job involved moving in between pipes and ducts and generally working in close spaces. (Tr. 19). According to Claimant, ninety percent of the work was overhead, which he was unable to do. (Tr. 20). In addition, he had to work off of ladders for much of the time, which he was also unable to do. (Tr. 20). He then requested another job which would not require overhead work and was transferred to work on a "clean boat," which was nearly ready to be delivered to the Navy. (Tr. 21). On that job, Claimant cleaned and painted and did little to no overhead work. (Tr. 21-22). After that boat was completed, Claimant was sent to work on another boat where he was doing more overhead work, and he eventually complained to his supervisor that it was too difficult for him to do that type of work. (Tr. 22). Claimant testified that his supervisor then told him not to complain. (Tr. 22).

Claimant was then transferred to the Fabricator Shop, where he operated a trolley car by computer for about two or three months. (Tr. 22-23). The trolley car picked up steel and brought it into the ship to be sandblasted. (Tr. 23-24). Claimant did not have any problems operating the trolley car. (Tr. 54). However, according to Claimant, the computer would shut down about forty to fifty percent of the time. (Tr. 23-24). When that happened, he would have to shovel grit off the deck and floors. (Tr. 24). In addition, he would clean off the rolls and mix paint. (Tr. 24). Claimant said that shoveling grit made his shoulder hurt. (Tr. 24). He explained that the grit and ash weighed a lot, and when he informed his supervisor of his difficulties in doing the job, she told him to just do what he could. (Tr. 25). In Claimant's opinion, this job was outside his restrictions. (Tr. 32). Claimant held this job until he retired from Employer. (Tr. 28). He testified that if Employer had offered him a job within his restrictions, he would have kept working. (Tr. 38).

On cross-examination, Claimant acknowledged that in March 2000, he told Dr. Longnecker something about retiring from the shipyard in the fall but explained that he told Dr. Longnecker that he *might* have to retire, not that he *would* retire. (Tr. 55). He did not remember telling Dr. Longnecker in April 2000 that he was planning to retire in the summer or telling him in August 2000 that he was planning to retire in March. (Tr. 56-57). He reiterated that he only said that he might have to retire. (Tr. 56-57). Claimant testified that he told Dr. Longnecker that he had to retire in March because he "cut a deal" with Mr. Hayes to do so and he had to take what the shipyard would give him. (Tr. 58-60). Claimant did not recall telling Dr. Longnecker that he was handling his light duty job "pretty well" or that he was doing fine at work. (Tr. 61-63). He did not remember telling Dr. Longnecker in January 2001 that he had learned to live with his shoulder problem or that he could use his arm fairly well. (Tr. 63-64). Claimant testified that he told Dr. Longnecker that shoveling was hard for him and made his shoulder sore and that he felt that management was trying to "run [him] off." (Tr. 64). Claimant did not remember telling Dr. Longnecker that he wanted to work until March so he could receive improved Social Security benefits. (Tr. 62). He testified that he told Dr. Longnecker that he wanted to work until he was at least sixty-five so his benefits would not be cut. (Tr. 62-63). Claimant said that he did not see Dr. Longnecker in the time between February and June of 2001 because every time he saw the doctor, the doctor told him the same thing and he no longer needed prescription pain pills because he was taking Tylenol. (Tr. 64).

Claimant stated that he also told Joe Walker, who was monitoring his work for the Department of Labor, that he was retiring on March 14, 2001, because of his agreement with Mr. Hayes. (Tr. 60). He testified that if Mr. Walker's report did not indicate that, then the report was wrong. (Tr. 61). According to Claimant, he told Mr. Walker that if Employer let him stay on at the trolley car job, he would work until he was seventy. (Tr. 65). He said that Mr. Walker never knew that he was shoveling grit as part of his light duty job. (Tr. 72). He explained that he had not done shovel work when Mr. Walker first visited and that is why he never told Mr. Walker that he was working outside his limitations. (Tr. 72-73). In his hearing testimony, Claimant said that Mr. Walker had visited him two times at work and asked how he was doing, although Claimant said in his deposition that Mr. Walker had never asked him how he was doing. (Tr. 71-72). Claimant acknowledged that he often worked overtime but explained that he only worked overtime when he was operating the trolley car, not when he had to shovel grit. (Tr. 76-77).

Claimant denied telling Mr. Hayes that he was planning to retire. (Tr. 66). According to Claimant, he "begged" for that time. (Tr. 67). When asked why he retired on March 9 instead of waiting for March 14, Claimant said that he was having a lot of problems with his shoulder. (Tr. 68). Despite the fact that both a vocational rehabilitation expert and his supervisors said that his light duty job was suitable employment within his limitations, Claimant said that it was not suitable for him. (Tr. 68-69). He denied that Ms. Wiley told him not to do anything outside his limitations or that she ever told him to come see her if he had any work assignments that were outside his limitations. (Tr. 70-71).

Claimant does not receive any retirement benefits from Employer because he had to sell his retirement when his wife was dying in order to pay her hospital bills. (Tr. 32-33). He testified that there is no mandatory retirement age at the shipyard, but management prefers for people to retire at sixty-two. (Tr. 33). According to Claimant, although there are some employees older than sixty-two, there is backlash at work when someone keeps working past this age. (Tr. 34). He explained that he never filed a grievance against management with his union because to do so would be "working against [himself]." (Tr. 79-80). After his retirement, Claimant reapplied to work for Employer in the shipyard. (Tr. 34). He also applied at Able Body, a placement agency, but they did not have any jobs available for him at that time. (Tr. 35). Able Body told Claimant that they could get him a job at a casino and would call him when they had such a job available. (Tr. 78-79). He has earned some money doing yard work and averaged $100 to $125 a week mowing lawns. (Tr. 35-36). Other than doing yard work, Claimant has not done any work for cash since he left Employer. (Tr. 77). At the time of the hearing, Claimant was not very active because of high blood pressure and swollen feet. (Tr. 36). He has not applied for any light duty jobs recently. (Tr. 74).

Deposition of Melinda Wiley

Ms. Wiley is an employee relations representative with Employer. (EX. 17, p. 5). The duties of her job include assisting employees with permanent restrictions in their return to work and handling equal employment opportunity claims, attendance bonus and various other employee relations matters. (EX. 17, p. 5). According to Ms. Wiley, Employer's return to work program benefits both the employee and the company. (EX. 17, p. 46). She first met with Claimant on July 11, 2000, when he returned to work with his permanent restrictions from Dr. Longnecker. (EX. 17, pp. 6-7).

Ms. Wiley explained that when Claimant was working with temporary work restrictions, a restriction coordinator in the medical department would have been in charge of him. (EX. 17, p. 7). In that process, the company will initially attempt to place employees with temporary restrictions in some job in their original department, but otherwise, they may be assigned to drive a van, work in a repair shop, answer telephones or sort materials. (EX. 17, pp. 8-9). Ms. Wiley testified that Claimant's temporary work restrictions were essentially the same as his permanent restrictions. (EX. 17, p. 31). She did not know why Claimant was not employed in the paint department when he still had temporary restrictions. (EX. 17, p. 32). Ms. Wiley also did not know why or even if Claimant was transferred out of the temporary program on the day before she met with him. (EX. 17, pp. 41-42).

When Claimant presented his permanent restrictions to Ms. Wiley, she completed a return to work form that indicated these restrictions. (EX. 17, pp. 12-13). She then contacted Dave Whitney, the director of the paint department, who said that he was unable to accommodate Claimant with his permanent restrictions. (EX. 17, p. 13). Ms. Wiley suggested that Claimant go to Internal Placement in order for him to seek light duty jobs in other departments within the company. (EX. 17, pp. 13-14). Ms. Wiley testified that she left it up to Claimant's discretion whether he wanted to contact Mr. Hayes, the paint department superintendent, and see if he could help. (EX. 17, p. 45). When Claimant was told that there was no job available for him in the paint department, he became upset

and contacted Mr. Hayes. (EX. 17, p. 14). On the same day, Mr. Hayes found a job for Claimant in the paint department and he was sent back to Ms. Wiley to be processed so that he could be reinstated to his job. (EX. 17, p. 16). Claimant was put back on the payroll and went to work as a service painter on second shift that evening. (EX. 17, pp. 19-20). As a second shift employee, Claimant was entitled to a shift differential; he was earning $15.07 per hour and was eligible for overtime. (Ex. 17, pp. 21-22).

Ms. Wiley had no more contact with Claimant after the day that he was reinstated to work. (EX. 17, pp. 22-23). She explained that she would observe an employee at work if the employee called to complain or the department complained about the employee. (EX. 17, p. 26). Since Ms. Wiley never observed Claimant at work, she relied on Mr. Walker's reports to keep her informed as to how Claimant was doing. (EX. 17, p. 23). According to Mr. Walker's reports, Claimant was working as a service painter, touching up paint on nearly finished ships. (EX. 17, pp. 23-24). Ms. Wiley explained that for this job, Claimant probably had to use a one gallon bucket of paint, a paintbrush and perhaps some clean up materials like rags and brushes. (EX. 17, p. 24). In addition, Claimant worked in the fab shop, operating the automated machinery that cleans steel. (EX. 17, pp. 24-25). Ms. Wiley testified that there is no job description for a service painter or for the fab shop position. (EX. 17, pp. 25-26). She stated that Claimant's job was a permanent position, not merely a temporary position that would only be available until he retired. (EX. 17, p. 47). She explained that giving Claimant a temporary position until he retired would be improper and would give rise for Claimant to file a grievance with the union. (EX. 17, p. 47). Claimant never filed such a grievance. (EX. 17, p. 47). In fact, Mr. Walker's reports indicated that Claimant was happy to be back at work and that Claimant had talked to Mr. Walker regarding his plans to retire. (EX. 17, p. 52).

Ms. Wiley testified that she discussed Claimant's work restrictions with him when she filled out the return to work form and that Claimant did not disagree with his restrictions. (EX. 17, p. 51). Claimant was told that if he was asked to do anything outside his restrictions, he should contact Ms. Wiley; Claimant never contacted her. (EX. 17, p. 51). She agreed that if Claimant had done overhead work with his left arm, that would be outside his restrictions. (EX. 17, p. 32). Ms. Wiley testified that the shoveling work done by Claimant would not have been outside his work restrictions. (EX. 17, p. 32). After Claimant's retirement, Ms. Wiley investigated his allegations that he had been made to do overhead work but does not have any written documentation of the investigation. (EX. 17, pp. 53, 56-57, 58-59). She was not aware of any notes or other documentation kept on Claimant within the paint department. (EX. 17, p. 33, 44). She agreed that Dr. Longnecker's records indicated that Claimant had said several times that he wanted to retire soon. (EX. 17, pp. 48-50).

According to Ms. Wiley, Claimant could have continued to work for Employer had he not retired, and by retiring, he gave up his seniority. (EX. 17, p. 54). Ms. Wiley affirmed that Claimant reapplied to Employer in July 2001 and explained that he was not rehired because they were not hiring painters at that time. (EX. 17, p. 28). She did not receive any labor market survey reports about Claimant. (EX. 17, p. 41).

Deposition of Terry Hayes

Mr. Hayes works for Employer as a general superintendent in the paint department. (EX. 18, p. 5). He has known Claimant for many years. (EX. 18, p. 6). When Claimant returned to work with permanent restrictions, Mr. Hayes' director, Dave Whitney, said that there were no jobs available within his restrictions. (EX. 18, p. 10). Claimant then went to Mr. Hayes and asked if it would be possible for him to work until he retired in March 2001. (EX. 18, pp. 11-12, 43). Mr. Hayes did not know why Claimant was planning to retire in March. (EX. 18, p. 25). He agreed to review Claimant's restrictions and take the matter up with Mr. Whitney. (EX. 18, pp. 12-14). Mr. Whitney told Mr. Hayes that it was his decision to make and if he could find a job for Claimant, then Claimant could come back to the paint department after all. (EX. 18, p. 14). Mr. Hayes then called Ms. Wiley and told her that he would work Claimant within his restrictions. (EX. 18, p. 14).

Employer's philosophy is to try to bring back as many work restricted employees as they can. (EX. 18, p. 48). Mr. Hayes described the process for bringing back an employee with permanent work restrictions. (EX. 18, p. 31). A restricted duty employee is assigned to an area where he can work within his restrictions and is given a copy of his restrictions to present to the supervisor. (EX. 18, pp. 32-33). Employees with permanent restrictions still retain their seniority and their pay scale and are not treated differently in terms of being discriminated against. (EX. 18, pp. 41-42). In the event of a transfer, the employee must inform his or her new supervisor of the restrictions. (EX. 18, pp. 32-33). Further, if there is a problem with working within the restrictions, the employee should tell management or go to the hospital. (EX. 18, p. 33). The supervisor assigns duties to the employee on a daily basis, and the job assignments can vary as long as they fit within the work restrictions. (EX. 18, p. 34). Mr. Hayes agreed that employees must take an active role in making sure that they are working within their restrictions. (EX. 18, pp. 51-52). He stated that everyone at work knows the policy on not working outside of restrictions. (EX. 18, p. 37). He does not know of any employees who have been reluctant to report problems with working outside of their restrictions. (EX. 18, p. 37).

When asked what duties Claimant performed once he was brought back to work, Mr. Hayes was unsure but believed that he worked in the "plate and shape line" for a while. (EX. 18, pp. 15-16). He agreed that Claimant might have shoveled steel grit as part of his duties, but he had no personal knowledge of whether Claimant had done so. (EX. 18, pp. 17-18). He explained that often workers do shovel the steel grit off the floors, and they use small household shovels to do so, so there is no heavy lifting involved. (EX. 18, pp. 18-19). Usually, about four workers will shovel for fifteen to twenty minutes, maybe once a week and maybe more often. (EX. 18, p. 20).

Since Claimant worked as a service painter for a while after he returned to work, Mr. Hayes explained that service painters touch up paint in damaged spots or on valves. (EX. 18, pp. 35-36). He acknowledged that overhead work is a possibility with this job, although he did not know what percentage of work would be overhead. (EX. 18, pp. 35-36). He said that running a trolley car, another of Claimant's duties, does not involve any overhead work or lifting above twenty pounds, nor does shoveling steel grit. (EX. 18, pp. 36-37).

Mr. Hayes testified that he never had any conversations with Claimant or anyone else about whether Claimant was being worked outside of his restrictions. (EX. 18, pp. 16-17, 26, 38-39). He had no knowledge of whether anyone ever told Claimant that he "had better do whatever he's told." (EX. 18, p. 38). If Claimant had told Mr. Hayes that he was working outside his restrictions, Mr. Hayes would have made sure that he worked within his restrictions from then on by speaking with Claimant's supervisor and advising Mr. Walker and Ms. Wiley of the situation. (EX. 18, pp. 29, 39-40, 46-47). As far as Mr. Hayes knew, Claimant was working within his restrictions until he retired. (EX. 18, p. 23). He explained that Mr. Walker would have probably been the one to report something like that, and he never said anything about it. (EX. 18, p. 17). Mr. Hayes knew that Mr. Walker periodically monitored employees who were returning to work, but he did not know how often Mr. Walker did so. (EX. 18, p. 17). Mr. Hayes did not see Claimant on a day-to-day basis. (EX. 18, p. 24). Mr. Hayes recalled that at one point, Claimant did come to him and report that his shoulder was hurting, and Mr. Hayes told him to go to the company hospital, but he does not remember when that happened. (EX. 18, pp. 23-24). He does not remember ever getting any phone messages from Claimant. (EX. 18, p. 25).

Mr. Hayes indicated that if Claimant had not retired in March, he could have kept working in his light duty job. (EX. 18, p. 26). He denied ever telling Claimant that he could only come back if he agreed to retire in March. (EX. 18, p. 43, 45, 56). In fact, he did not even know when Claimant was eligible for retirement. (EX. 18, p. 45). Mr. Hayes stated that he has never told an employee when to retire. (EX. 18, pp. 43-44). Rather, it is a personal judgment call for each employee as to when he is ready to retire. (EX. 18, p. 55).

Mr. Hayes testified that the paint department currently employs people with permanent work restrictions. (EX. 18, p. 55). If he was able to, Mr. Hayes would rehire Claimant now because he was a good employee. (EX. 18, p. 27, 55). He was surprised to hear that Claimant had reapplied to the paint department since Claimant had told him that he wanted to retire in March 2001. (EX. 18, p. 27, 58).

Deposition of Joe H. Walker, C.R.C.

Mr. Walker is a vocational rehabilitation counselor who is certified through the Department of Labor Office of Workers' Compensation Programs (OWCP) as a rehabilitation counselor. (EX. 22, p. 4). He has been retained as an independent contractor by the OWCP in Employer's return to work program for employees with permanent work restrictions. (EX. 22, p. 5, 23). Either the Department of Labor or Employer would have paid his fee, depending upon whether it was a direct referral from Employer or not. (EX. 22, pp. 24-25). He estimates that since 1989, about forty to fifty percent of his work has been with Employer's return to work program as authorized by the Department of Labor, with ten to fifteen percent of his work involving outside vocational consulting assignments and labor market surveys. (EX. 22, p. 26).

In this case, Mr. Walker was retained in July 2000 to monitor Claimant's return to work with permanent work restrictions placement. (EX. 22, p. 6, 7). The duties of this job include talking with

the injured worker about his restrictions, discussing and reviewing the worker's tasks and duties, discussing the work site location and assignments with supervisors and the employee and monitoring the employee's work adjustment, production and attendance. (EX. 22, pp. 6-7). Before Mr. Walker even received the assignment to monitor Claimant, Claimant approached him at the work site and discussed his situation. (EX. 22, pp. 27-28). Claimant anticipated going from temporary to permanent restrictions very soon and told Mr. Walker of his intentions of working through the end of the year and then looking at the possibility of retirement. (EX. 22, pp. 27-28). According to Mr. Walker, Claimant's work restrictions from Dr. Longnecker included no overhead work, no lifting over twenty pounds, no climbing, no crawling and no repetitive use of the left arm. (EX. 22, pp. 9-10). Mr. Walker agreed that Dr. Longnecker's May 31, 2000 report indicated that Claimant already had done some overhead work outside of his restrictions. (EX. 22, pp. 43-44). Mr. Walker was aware that Claimant was initially disqualified from work with his permanent restrictions but was later given a job after speaking with Mr. Hayes. (EX. 22, p. 28).

Mr. Walker monitored Claimant at work through contacts and visits in July, August and September 2000. (EX. 22, p. 10). He estimated that he met with Claimant about six or seven times. (EX. 22, p. 13). On his visits, he typically first made contact with Ms. Wiley and then went to the shipyard to see if there had been any reported problems or complainants. (EX. 22, p. 10). He met with various paint department personnel. (EX. 22, pp. 10-11). He testified that all of these people were aware of Claimant's work restrictions. (EX. 22, p. 11). Mr. Walker believed that Claimant had a positive working relationship with his supervisors. (EX. 22, p. 14). The supervisors told Mr. Walker that if Claimant ever had any problems with his work assignments, he could discuss it with his superiors. (EX. 22, pp. 61-62). He explained that Claimant initially worked as a service painter doing touch up and clean up work on ships, then he was moved to the steel fabrication shop, where he operated a trolley that controlled the movement of steel plates. (EX. 22, pp. 11-12). Mr. Walker affirmed that Claimant's wage with his modified job was greater than his wage had been the year before. (EX. 22, pp. 21-22). It was a permanent job, and there were no complaints by Claimant's superiors regarding the quality or quantity of his work. (EX. 22, p. 22).

Usually when Mr. Walker visited the work site, he paged Claimant to come meet with him and they would talk and then go see where he was working. (EX. 22, p. 13). Mr. Walker testified that he did observe Claimant on the job and that Claimant was always very positive about how he was doing. (EX. 22, pp. 13-14). He acknowledged, however, that he did not observe or speak to Claimant on every single visit, often due to scheduling conflicts, and that he did not actually see Claimant performing any work activities except on his last visit, when he watched Claimant operating the trolley for about half an hour. (EX. 22, pp. 31-39). Claimant never complained to Mr. Walker about pain or about working outside his restrictions. (EX. 22, p. 14). On the contrary, Claimant felt that his work restrictions were compatible with his physical capabilities. (EX. 22, p. 14). In discussing how Claimant dealt with his work restrictions, Mr. Walker mentioned that although Claimant did not climb ladders or work off of scaffolds, he could climb stairs on the ship as long as there was a handrail. (EX. 22, p. 15). He agreed that if Claimant was doing overhead work, he would be working outside his restrictions. (EX. 22, p. 51).

Mr. Walker prepared two reports in conjunction with monitoring Claimant, and he testified that these reports accurately presented his impressions and feelings during the time that he met with Claimant. (EX. 22, pp. 14-15). The information that he obtained about Claimant's return to work came from discussions with Claimant's supervisors as well as discussions with Claimant. (EX. 22, p. 40). When asked about inconsistencies between his reports and Claimant's deposition, Mr. Walker noted that contrary to Claimant's deposition testimony about working outside his restrictions, Claimant had not told Mr. Walker that he was working outside his restrictions. (EX. 22, p. 17). In another inconsistency, while Claimant testified that Mr. Walker had never asked him how he was doing, Mr. Walker pointed out that not only had he done so, but that monitoring how Claimant was doing was the whole purpose of his visits to the work site. (EX. 22, p. 17). Mr. Walker also stated that he never saw Claimant shoveling any steel grit in the fabrication shop. (EX. 22, p. 18). However, Mr. Walker testified that shoveling of this sort could still be within Claimant's restrictions as long as he monitored himself with regard to the type of scooping or the amount of material scooped. (EX. 22, p. 19).

Mr. Walker testified that there were three topics that Claimant often brought up in their discussions. (EX. 22, p. 19). First, Claimant talked about his pride in his work activity and relationship to paint department personnel. (EX. 22, pp. 19-20). In addition, Claimant said that his modified work activity was "very satisfactory and suitable," both in working as a service painter and working in the steel yard. (EX. 22, p. 20). The other thing that Claimant talked about was his impending retirement. (EX. 22, p. 20). He told Mr. Walker that he was planning on working into the first quarter of 2001. (EX. 22, p. 21). Mr. Walker acknowledged that on occasion, Claimant did say that he could work another six years if all he had to do was operate the trolley car. (EX. 22, pp. 44-45). He said this was yet another example of Claimant's positive comments regarding his work. (EX. 22, p. 45). On a related issue, when asked about Dr. Longnecker's August 11, 2000 report, Mr. Walker testified that it said that Claimant was doing well at work, had reached maximum medical improvement and planned to retire in March. (EX. 22, pp. 54-55).

Mr. Walker reviewed a vocational rehabilitation report by Tommy Sanders and agreed that the work assigned by Mr. Sanders would be suitable modified activity as a service painter. (EX. 22, p. 16). In addition, Mr. Walker reviewed a labor market survey done by Mr. Sanders and agreed that those jobs, which included cashier positions and a light custodial position, were compatible with Claimant's age, education, vocational background and medical limitations. (EX. 22, pp. 22-23). Mr. Walker did not recall reading in Mr. Sanders' report that he was unable to determine what specific duties Claimant performed after he returned to work with permanent restrictions. (EX. 22, pp. 40-41). He agreed that Mr. Sanders' opinions in the report came from his conversations with Steve Meredith, Claimant's immediate supervisor. (EX. 22, p. 41).

Although Mr. Walker is certified to do certain kinds of vocational testing, including testing an individual's reading and math abilities, he did not do any vocational testing on Claimant. (EX. 22, p. 46). According to Mr. Walker, when an employee returns to work in a modified position with the same employer, vocational testing is not necessary. (EX. 22, p. 55). He testified that he was not aware that Leon Tingle, another vocational rehabilitation counselor, had given Claimant a vocational

test which showed that he was functionally illiterate. (EX. 22, p. 47). Mr. Walker did not know that Claimant scored on a fourth grade level in reading and a third grade level in math. (EX. 22, p. 47). He agreed that Claimant could not go back to doing all his pre-injury duties as a painter. (EX. 22, p. 48). Mr. Walker acknowledged that if Claimant's reading and math skills were at such a rudimentary level, he would not be able to perform the cashier or fuel attendant jobs suggested by Mr. Sanders, although he would still be able to work as a porter. (EX. 22, p. 50, 61). Further, if Claimant were functionally illiterate, his retraining opportunities would be limited and he would probably undergo a wage differential in moving to another job. (EX. 22, pp. 52-53). Mr. Walker explained that the vocational test used by Mr. Tingle is objective in that the evaluation of a person's responses are based on the norms for the age and educational level. (EX. 22, p. 57). It is also subjective in that it relies on the cooperation of the person being tested. (EX. 22, p. 58). Mr. Walker testified that the results of this test are inconsistent with Claimant's educational background as well as his responsibilities, past work activity and his interaction with Mr. Walker. (EX. 22, p. 60). He agreed that if it were true that Claimant could not write checks and was unable to fill out his own employment application when he first went to work for Employer, that would be consistent with a third or fourth grade reading level. (EX. 22, p. 62).

Medical Records of Dr. Arthur D. Black, M.D.

Claimant first presented to Dr. Black on August 25, 1999, a little over a month after his workplace accident. (EX. 15, p. 1). On their first visit, Dr. Black took an X-ray which showed some shoulder arthritis and a bone spur. (EX. 15, p. 1). He ordered an MRI to rule out the possibility of a torn rotator cuff. (EX. 15, p. 1). At work, Claimant was to refrain from doing work using his left arm. (EX. 15, p. 2). The MRI revealed that Claimant had a torn rotator cuff. (EX. 15, p. 3). On September 3, 1999, Claimant returned to see Dr. Black, who recommended surgery to repair the rotator cuff and suggested that Claimant get a second opinion since he wanted to get the surgery done closer to his home. (EX. 15, p. 4). Claimant mentioned going to see Dr. Longnecker, and Dr. Black concurred that this was a good choice. (EX. 15, p. 4). He ordered that Claimant continue on his current work restrictions in the meantime. (EX. 15, p. 5).

Medical Records of Dr. M.F. Longnecker, M.D.

Claimant first saw Dr. Longnecker on September 16, 1999. (CX. 1, p. 3). Upon examination, Dr. Longnecker wanted to schedule surgery as soon as it was approved by Employer. (CX. 1, p. 3). In the meantime, Claimant was to remain on light duty at work. (CX. 1, p. 3). On September 27, 1999, Claimant underwent surgery to repair the torn rotator cuff in his left shoulder. (CX. 1, p. 4). He saw Dr. Longnecker again on October 7, and Dr. Longnecker reported that Claimant's X-ray looked good and he would be starting on gradual range of motion exercises. (CX. 1, p. 6). When Claimant returned on October 21, his shoulder was still sore and Dr. Longnecker planned to consider physical therapy at their next visit. (CX. 1, p. 7). On November 10, Dr. Longnecker referred Claimant to physical therapy, noting that he still was not ready to return to work. (CX. 1, p. 8). On December 1, Dr. Longnecker reported that Claimant was improving with the therapy and was no longer experiencing significant pain. (CX. 1, p. 9). Dr. Longnecker anticipated that Claimant could

return to duty in the shipyard in January. (CX. 1, p. 9). Claimant continued with physical therapy into the new year and had plateaued by January 3, 2000. (CX. 1, p. 10, 11). At that point, Dr. Longnecker released Claimant to work with restrictions including no overhead work and no lifting over ten pounds. (CX. 1, p. 11). If Claimant's shoulder had not loosened in about a month, Dr. Longnecker said that he might consider manipulation. (CX. 1, p. 11).

On January 28, 2000, Dr. Longnecker decided that Claimant should undergo a shoulder manipulation. (CX. 1, p. 12). Claimant underwent the procedure on February 4, and on February 9, Dr. Longnecker reported that Claimant's range of motion had improved and his pain was dissipating. (CX. 1, p. 14, 15). Dr. Longnecker wanted Claimant to do three weeks of physical therapy before returning to light duty work. (CX. 1, p. 15). On March 1, Dr. Longnecker reported that although Claimant's shoulder was still stiff, it was improving. (CX. 1, p. 17). According to the doctor, Claimant said that he might retire in the fall from the shipyard. (CX. 1, p. 17). Dr. Longnecker hoped to release Claimant to MMI in two to three months to "try to keep him going as long as we can before his retirement." (CX. 1, p. 17).

On April 28, Claimant's condition had again plateaued, and Dr. Longnecker planned to give him one more month before releasing him to work. (CX. 1, p. 19). Apparently Claimant told Dr. Longnecker that he was not quite ready to return to work and was planning to retire in the summer anyway. (CX. 1, p. 19). On May 31, Claimant was still having problems with overhead work and had restricted movement in his shoulder and arm. (CX. 1, p. 20). Dr. Longnecker believed that Claimant had reached MMI and returned him to work on June 2 with temporary restrictions of no overhead work, no repetitive use of the left arm and no lifting over twenty pounds waist high. (CX. 1, p. 20). Dr. Longnecker estimated that Claimant had suffered a twenty-five percent loss of function to the left shoulder as a scheduled member. (CX. 1, p. 20). The doctor believed that Claimant would likely be on permanent restrictions until he retired. (CX. 1, p. 20).

On June 28, Dr. Longnecker reported that Claimant was handling his light duty work pretty well although he was having some discomfort. (CX. 1, p. 21). Dr. Longnecker again expressed that Claimant would need to be on permanent restrictions until retirement. (CX. 1, p. 21). On July 10, Claimant reported to Dr. Longnecker that he wished to finish out the year so that he could get better Social Security benefits. (CX. 1, p. 23). The doctor noted that Employer was working with Claimant to try to put him on permanent restrictions until he retired, and the doctor had no problem with that. (CX. 1, p. 23). He gave Claimant a note with permanent restrictions for the rest of the year. (CX. 1, p. 23). These restrictions were no climbing, no crawling, no lifting over twenty pounds, no repetitive use of the left arm and no overhead work. (CX. 1, p. 24). On August 11, Dr. Longnecker reported that Claimant was doing reasonably well and not having any problems at work. (CX. 1, p. 25). Dr. Longnecker noted that Claimant could handle his job and wanted to continue before retiring in March. (CX. 1, p. 25). He reiterated his opinion that Claimant had reached MMI. (CX. 1, p. 25).

On January 28, 2001, Claimant presented to Dr. Longnecker with complaints of trouble with his shoulder but planned to keep working until retiring in March. (CX. 1, p. 25). Dr. Longnecker told Claimant that there was nothing more he could do for him other than refill his pain medications.

(CX. 1, p. 25). On February 28, Claimant reported that he was retiring the next week. (CX. 1, p. 25). He told Dr. Longnecker that he had been doing reasonably well until about two weeks previous, when a thirty pound case fell onto his left shoulder. (CX. 1, p. 25). He went to the company doctor, who took an X-ray and said that everything looked fine and then gave Claimant some anti-inflammatory medication, which helped a little. (CX. 1, p. 25). Upon examination, Dr. Longnecker noted some limited motion as well as a contusion which was the result of the recent accident. (CX. 1, p. 25). He expected this injury to heal. (CX. 1, p. 25).

On June 28, Claimant presented to Dr. Longnecker with complaints of shoulder and elbow pain. (CX. 1, p. 26). He told the doctor that he was now retired and on full disability but was struggling. (CX. 1, p. 26). On November 7, Claimant returned for a follow up. (CX. 1, p. 26). He reported that he was still unable to do overhead work, but Dr. Longnecker commented that Claimant had "good strength" and was in less pain than in the past. (CX. 1, p. 26). Claimant said that he was trying to find a job to supplement his income. (CX. 1, p. 26).

Vocational Rehabilitation Reports of Tommy Sanders, C.R.C.

In June/July 2001, Mr. Sanders was asked to determine the duties that Claimant performed at work after he was released with permanent restrictions. (EX. 23, p. 3). He spoke with several of Claimant's supervisors in the paint department as well as reviewing Mr. Walker's reports. (EX. 23, p. 3). He also obtained Claimant's work restrictions–no climbing, crawling, lifting over twenty pounds, overhead work or repetitive use of the left arm. (EX. 23, p. 3). Mr. Sanders was unable to determine all the specific duties that Claimant performed during this period. (EX. 23, p. 3).

According to one supervisor, Steve Meredith, Claimant had worked for a time as a service painter, utilizing a one gallon paint bucket with a plastic insert and a quarter to half gallon of paint, as well as a brush, a roller and some cleaning cloths. (EX. 23, p. 3). Claimant performed touch up painting on a ship, and his other duties included covering up material with masking tape and paper and cleaning of overspray by utilizing a broom or foxtail brush to sweep or clean the deck. (EX. 23, pp. 3-4). Claimant was allowed to sit, squat or kneel while performing his duties. (EX. 23, p. 4).

When there was not much service painting work to be done, Claimant would work in the fabrication shop operating the machinery that moved steel. (EX. 23, p. 4). Mr. Sanders referred to Mr. Walker's reports, which indicated that Claimant never complained about being worked outside his restrictions and that his attendance and production were satisfactory. (EX. 23, p. 4). In fact, Claimant asked for and received overtime during his permanent restriction period. (EX. 23, p. 4). Mr. Meredith told Mr. Sanders that there would be no job assignments requiring Claimant to climb ladders, crawl or do overhead work with his left arm but that Claimant might have been required to climb, at the most, ten flights of permanently installed stairs. (EX. 23, p. 4).

According to Mr. Meredith and Jessie Rivers, another paint department supervisor, there was still light duty work available up to and after Claimant retired from Employer. (EX. 23, p. 4). During the spring of 2001, the paint department hired about 100 new painters and at the time of Mr. Sanders'

report, there were thirty-five to forty painters on work restrictions. (EX. 23, p. 4). For painters who work second shift, as Claimant did before his retirement, there were many small touch up jobs on the ships and thus greater latitude to assign duties according to Claimant's restrictions. (EX. 23, p. 4). In addition, Mr. Sanders spoke with Mr. Hayes, who told him that Claimant had requested to work until he retired in March 2001. (EX. 23, p. 4). Mr. Hayes said that if Claimant had wanted to continue working, he would have accommodated him and would still be willing to do so if Claimant returned to the shipyard. (EX. 23, p. 4). Based on his discussions with Claimant's supervisors, Mr. Walker's report, Mr. Meredith's confirmation of the report and Mr. Sanders' own knowledge of Employer's return to work program, Mr. Sanders concluded that there was work activity in the shipyard which conformed to Claimant's restrictions. (EX. 23, p. 4).

July 23, 2001 Labor Market Survey

Mr. Sanders prepared a labor market survey based on factors such as Claimant's age, education, work history and medical restrictions. (EX. 23, p. 6). Claimant's pre-injury work activity was skilled in nature and involved a range of mid-level physical activity. (EX. 23, p. 6). Based upon his permanent restrictions, he would be unable to return to his former employment without modifications similar to those that he had when he returned to work with restrictions. (EX. 23, p. 6). Mr. Sanders determined that Claimant would be qualified for entry level unskilled to semi-skilled jobs involving a range of sedentary to light physical activity. (EX. 23, p. 7). This type of job includes positions such as fuel booth cashier, casino porter, gate guard, security monitor, security guard, light delivery and parking lot attendant. (EX. 23, p. 7).

The following employers were receptive to hiring Claimant in July 2001:

1. Munro Petroleum, Cashier: Duties include operating cash register, accepting payment, completing shift reports and occasionally assisting with restocking; requires occasional lifting of five to ten pounds, occasional sitting, bending and stooping with frequent standing, walking and handling; training provided; twenty to forty hour work week; $6 to $6.50 per hour wages. (EX. 23, p. 7, 9).

2. Coastal Energy, Fuel Booth Attendant: Duties include operating cash register/credit card machine, completing shift reports, cleaning restrooms, emptying trash, cleaning gas pumps and taking pump readings; requires occasional lifting of five to ten pounds, occasional pushing and pulling of three to five pounds, occasional bending and stooping with the ability to alternately stand, walk or sit; twenty to forty hour work week; entry wages of $6.15 per hour. (EX. 23, pp. 7-8, 9).

3. Imperial Palace, Casino Porter: Duties include dusting slot machines, cleaning ash trays, picking up bottles/glasses, running a handheld sweeper around slots and adjacent areas, cleaning restrooms, walkways and other areas and emptying trash cans; requires occasional lifting of ten pounds, frequent lifting of three to five pounds, frequent pushing and pulling of about ten pounds, occasional sitting, bending and stooping with frequent handling and

frequent to constant standing and walking; training is provided; forty hour work week; entry wages of $7.25 per hour. (EX. 23, p. 8, 10).

Mr. Sanders also noted that in March 2001, Munro Petroleum hired three cashiers, Coastal Energy hired two cashiers and American Citadel hired a full time security guard at $7 per hour. (EX. 23, p. 8).

February 21, 2002 Labor Market Survey

After reviewing Mr. Tingle's November 2001 vocational evaluation report, Mr. Sanders conducted a follow up labor market survey based on the assumption that Claimant functions at the third or fourth grade level with respect to word recognition and math. (EX. 23, p. 12). Mr. Sanders pointed out that the test used by Mr. Tingle is subjective in nature and requires a good faith effort on the part of the person being tested. (EX. 23, p. 12). He stated that Mr. Tingle had concluded that even if Claimant was functioning at these levels, he could still expect to earn $7 to $8 per hour, although his options would be limited. (EX. 23, p. 12).

As of February 12, 2002, the following employers were accepting jobs for which Claimant should be qualified, assuming functional illiteracy:

1. Grand Casino, Casino Housekeeper: Duties include responsibility for cleaning an assigned area, cleaning and dusting around slot machines, emptying and wiping ash trays, picking up glass containers, running handheld sweepers around the area adjacent to the slots, emptying trash cans, possibly sweeping and mopping restrooms and cleaning/wiping lavatory areas; requires frequent lifting of two to three pounds, occasional pushing and pulling of five to ten pounds, occasional bending/stooping, frequent to constant standing/walking except when on break and frequent use of the upper extremities; no activities outside Claimant's permanent restrictions; thirty to thirty-two hour work week; entry wages of $6.50 per hour. (EX. 23, pp. 12-13).

2. Imperial Palace, Casino Porter: Duties include all of those enumerated in #1 above, as well as occasional lifting and carrying of up to ten pounds; forty hour work week; entry wages of $7.50 per hour. (EX. 23, p. 13).

3. Republic Parking at Biloxi-Gulfport Airport, Short Term Vehicle Inspector: Duties include visually inspecting the inside of vehicles that are parking in the short term lot, opening the trunk to observe contents and contacting airport security if anything appears suspicious; must have reading and writing skills sufficient to write down make, model and tag number of suspicious vehicles; training provided; forty hour work week; entry wages of $6 per hour. (EX. 23, p. 13).

4. William Carey College Professional Security, Security Guard: Duties include riding around campus in a golf car making a five to ten minute round once an hour, checking buildings to

ensure doors are locked, and if working night shift, reopening the doors in the morning and keeping records by noting the time of each round and maintaining a check list of all locked doors on an activity sheet; requires occasional lifting of up to five pounds, frequent sitting/handling and occasional standing/walking; full and part time jobs available; entry wages of $6.25 per hour. (EX. 23, p. 13).

5. Thrifty Car Rental, Car Lot Attendant/Car Cleaner: Duties include delivering cars to the airport and various hotel/casino locations, washing and vacuuming the cars and possibly also refueling them; a twenty pound weight lifting limitation would not pose a problem; full and part time jobs available; entry wage unavailable (but at least minimum wage). (EX. 23, p. 13).

In sum, Mr. Sanders concluded that assuming Mr. Tingle's findings about Claimant's reading and math levels to be accurate, Claimant would be qualified for each of these jobs and should be capable of being trained to perform the limited record keeping required. (EX. 23, p. 14). Mr. Sanders also noted that despite the fact that the casino porter jobs require frequent use of the upper extremities, most people use their dominant extremity when performing tasks, and Claimant is right handed with a left shoulder impairment. (EX. 23, p. 14).

Vocational Evaluation Reports of Leon Tingle, MS-LPC

Claimant was referred by his attorney to Mr. Tingle for an evaluation of his employability and wage-earning capacity. (CX. 15, p. 1). On November 12, 2001, Mr. Tingle met with Claimant to interview him and administer two sub-tests of the WRAT-R2 Achievement Tests to assess his reading and math skills. (CX. 15, p. 1). Mr. Tingle also prepared a follow up report on January 24, 2002. (CX. 15, p. 6).

During the interview, Claimant described his work history, his injury and the restrictions that Dr. Longnecker had given him when he returned to work. (CX. 15, p. 2). He told Mr. Tingle that when he returned to work with permanent restrictions, the jobs that he was given were outside of his restrictions. (CX. 15, p. 1). Upon later review, Mr. Tingle noted that Claimant was working within his restrictions until Mr. Walker stopped monitoring him. (CX. 15, p. 6). He cited examples from Claimant's deposition, such as Claimant being required to do overhead work as a service painter and shoveling steel grit and cleaning out mud when the trolley car was not operating. (CX. 15, p. 6). Claimant said that he would like to work a few more years before he retires. (CX. 15, p. 1). Based upon Claimant's description of the job that he had performed before his injury, Mr. Tingle felt that Claimant was unable to return to work at his old job. (CX. 15, p. 2).

Claimant reported that he was currently experiencing a nagging pain in his shoulder as well as episodic neck pain. (CX. 15, p. 2). He had access to dependable transportation but admitted to a past felony conviction which could affect his employability. (CX. 15, p. 3). Claimant told Mr. Tingle that since his retirement, he had earned about $300 a month doing yard work but that this was a seasonal position and he was currently unable to find work. (CX. 15, p. 3).

With regard to educational background, Claimant completed the tenth grade and never attempted to earn his GED; he received on-the-job training for his positions. (CX. 15, p. 3). Claimant said that he was not very good at reading, writing or doing math. (CX. 15, p. 3). The results of the WRAT-R2 tests indicated that Claimant read at the fourth grade level and had third grade level math skills. (CX. 15, p. 3). Mr. Tingle concluded from these scores that Claimant was functionally illiterate. (CX. 15, p. 3). In addition, based on a review of Claimant's job history, he did not have any lighter transferrable work skills that he could utilize with light duty jobs within similar companies. (CX. 15, p. 4). Mr. Tingle also noted that Claimant has a past felony conviction, "which could adversely affect his residual employment." (CX. 15, p. 3).

Mr. Tingle concluded that Claimant would have difficulty obtaining employment and had suffered a loss of wage-earning capacity due to his injury. (CX. 15, p. 4). Due to Claimant's physical restrictions, he now had a fifty percent reduction in access to other semi-skilled jobs which would require lifting, bending and stooping. (CX. 15, p. 5). Further, since his marketable transferable skills were marginal and his ability to be retrained was limited by his functional illiteracy, Claimant had also suffered a loss of wage- earning capacity and could probably only earn $7 to $8 per hour. (CX. 15, p. 5).

In his January 24, 2002 follow up report, Mr. Tingle stated that based on a labor market survey which factored in Claimant's age, education and work history, Claimant could have been expected to earn $5 to $6 per hour in July 2001. (CX. 15, p. 6).

DISCUSSION

Credibility

In arriving at a decision in this matter, it is well-settled that the fact-finder is entitled to determine the credibility of the witnesses, weigh the evidence and draw his own inferences from it and is not bound to accept the opinion or theory of any particular medical examiner. Todd Shipyards v. Donovan, 200 F.2d 741 (5th Cir. 1962); Atlantic Marine, Inc. and Hartford Accident & Indem. Co. v. Bruce, 666 F.2d 898, 900 (5th Cir. 1981); Banks v. Chicago Grain Trimmers Ass'n, Inc., 390 U.S. 459, 467, reh'g denied, 391 U.S. 928 (1968). It has been consistently held that the Act must be construed liberally in favor of the claimants. Voris v. Eikel, 346 U.S. 328, 333 (1953); J.B. Vozzolo, Inc. v. Britton, 377 F.2d 144 (D.C. Cir. 1967).

However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the claimant when evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. § 556(d), which specifies the proponent of a rule or position has the burden of proof. Director, OWCP v. Greenwich Collieries, 512 U.S. 267 (1994), aff'g 990 F.2d 730 (3d Cir. 1993).

In this case, Claimant's credibility has been compromised by the fact that none of the evidence corroborates his allegations that he was worked outside of his restrictions or that he was forced to

retire against his will. In fact, Claimant is the only one who testified to his version of events, whereas everyone else has testified to the exact opposite of this story. Because Claimant's testimony both in his deposition and at the hearing is in direct contradiction to the accounts of his supervisors, his doctor and a vocational rehabilitation expert who monitored his return to work, I cannot give much weight to his version of events. I shall weigh Claimant's testimony accordingly.

Nature and Extent

Having established work-related injuries, the burden rests with the Claimant to prove the nature and extent of his disability, if any, from those injuries. Trask v. Lockheed Shipbuilding Construction Co., 17 BRBS 56, 59 (1985). A Claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement (MMI). James v. Pate Stevedoring Co., 22 BRBS 271, 274 (1989); Trask, 17 BRBS at 60. Any disability before reaching MMI would thus be temporary in nature. The date of MMI is a question of fact based upon the medical evidence of record. Ballestros v. Willamette W. Corp., 20 BRBS 184 (1988); Williams v. General Dynamics Corp., 10 BRBS 915 (1979). An employee reaches MMI when his condition becomes stabilized. Cherry v. Newport News Shipbuilding & Dry Dock Co., 8 BRBS 857 (1978); Thompson v. Quinton Enter., Ltd., 14 BRBS 395 (1981).

The Parties in this case have stipulated that Claimant reached MMI on May 31, 2000.

The question of extent of disability is an economic as well as a medical concept. Quick v. Martin, 397 F.2d 644 (D.C. Cir. 1968); Eastern S.S. Lines v. Monahan, 110 F.2d 840 (1st Cir. 1940). Disability under the Act means an incapacity, as a result of injury, to earn wages which the employee was receiving at the time of the injury at the same or any other employment. 33 U.S.C. § 902(10). In order for a claimant to receive a disability award, he must have an economic loss coupled with a physical or psychological impairment. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Economic disability includes both current economic harm and the potential economic harm resulting from the potential result of a present injury on market opportunities in the future. Metropolitan Stevedore Co. v. Rambo (Rambo II), 521 U.S. 121, 122 (1997). A claimant will be found to have either no loss of wage-earning capacity, no present loss but a reasonable expectation of future loss (de minimis), a total loss or a partial loss.

A claimant who shows he is unable to return to his former employment has established a prima facie case for total disability. The burden then shifts to the employer to show the existence of suitable alternative employment. P & M Crane v. Hayes, 930 F.2d 424, 430 (5th Cir. 1991); New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1038 (5th Cir. 1981). Furthermore, a claimant who establishes an inability to return to his usual employment is entitled to an award of total compensation until the date on which the employer demonstrates the availability of suitable alternative employment. Rinaldi v. General Dynamics Corp., 25 BRBS 128 (1991). An employer can meet its burden of showing suitable alternative employment by offering the claimant a job in its facility, Spencer v. Baker Agricultural Co., 16 BRBS 205 (1984), including a light duty job, as long as it does not constitute sheltered employment. Darden v. Newport News Shipbuilding & Dry Dock Co., 18 BRBS 224

(1986). Moreover, a light duty job tailored to the claimant's restrictions is not sheltered employment as long as the work is necessary. Id. at 226.

It is undisputed that Claimant in this case could not return to his former employment as a full duty painter after reaching MMI. Nonetheless, Claimant returned to work in July 2000 with permanent restrictions and continued to work until his retirement in March 2001. According to Claimant's supervisors and two vocational rehabilitation experts familiar with his case, the jobs provided by Employer, in which Claimant worked as a service painter doing touch up work and also worked in the fabrication shop operating a trolley and occasionally shoveling steel grit, were suitable alternative employment which fit within Claimant's physical restrictions. Further, it is Employer's policy that any employee being worked outside of his restrictions report this to management or go to the company hospital, and Claimant never reported anything of the kind. In addition, Claimant drew a higher level of pay than he had enjoyed before his accident, earned more by working on second shift and even worked overtime. According to one of Claimant's supervisors, Claimant could have remained at his job if he had not chosen to retire. In fact, there are thirty-five to forty other workers in the paint department who are also on permanent work restrictions. Claimant's light duty job was neither sheltered employment nor was it outside of his restrictions. I find that Employer provided suitable alternative employment in its facility and that Claimant suffered no loss of wage-earning capacity as a result of his workplace accident.

Under the Act, "retirement" is defined as the voluntary withdrawal of an individual from the work force with no realistic expectation of return. Morin v. Bath Iron Works Corp., 28 BRBS 205 (1994); Johnson v. Ingalls Shipbuilding Div., Litton Sys., 22 BRBS 160 (1989); Smith v. Ingalls Shipbuilding Div., Litton Sys., 22 BRBS 46 (1989); 20 C.F.R. § 702.601(c) (2002). The determination as to whether an individual's retirement was voluntary or involuntary is based on whether the individual left his employment due to a work-related condition or if there were other considerations. Id.; MacDonald v. Bethlehem Steel Corp., 18 BRBS 181 (1986).

In this case, there is an overwhelming amount of evidence to support a finding that Claimant's retirement was voluntary, and no evidence, other than Claimant's testimony, to indicate that he was forced to leave his job before he was ready to retire. Contrary to what Claimant says in his deposition and hearing testimony, several other witnesses reported that Claimant had told them in conversation that he was planning to retire soon after returning to work so that he could begin drawing his Social Security benefits. Claimant first mentioned retiring to Dr. Longnecker in March 2000, several months before he had even returned to work with his permanent restrictions. Claimant also told Mr. Walker that he intended to consider retirement after finishing out the year, again before he was released with permanent restrictions. Mr. Hayes testified that Claimant asked if it would be possible for him to work until his retirement in March 2001. Mr. Walker testified that Claimant often spoke about retiring during their conversations. In addition, Dr. Longnecker's reports indicated that Claimant was doing well at work. Mr. Walker's reports reflected that Claimant reported having no problems with working in his restrictions. Finally, Ms. Wiley and Mr. Hayes never received any complaints from Claimant about being worked outside his restrictions and both testified that if Claimant had reported such a problem, the problem would have been solved by management. I find that Claimant voluntarily

retired in March 2001, and consequently, Employer no longer had to show suitable alternative employment after that date.

Average Weekly Wage

Sections 10(a) and 10(b) are the statutory provisions relevant to a determination of an employee's average annual wages where an injured employee's work is permanent and continuous. Duncan-Harrelson Co. v. Director, OWCP, 686 F.2d 1336, 1342 (9th Cir. 1982), vacated in part on other grounds, 462 U.S. 1101 (1983). The computation of average annual earnings must be made pursuant to subsection (c) if subsections (a) or (b) cannot be reasonably and fairly applied. 33 U.S.C. § 910. Section 10(a) applies where an employee "worked in the employment . . . whether for the same or another employer, during substantially the whole of the year immediately preceding" the injury. 33 U.S.C. § 910(a); Empire United Stevedores v. Gatlin, 936 F.2d 819, 25 BRBS 26 (CRT) (5th Cir. 1991); Duncan v. Washington Metro. Area Transit Auth., 24 BRBS 133, 135-136 (1990); Mulcare v. E.C. Ernst, Inc., 18 BRBS 158 (1986). Section 10(b) applies to an injured employee who worked in permanent or continuous employment, but did not work for "substantially the whole of the year" prior to injury. Gatlin, 936 F.2d at 21, 25 BRBS at 28 (CRT); Duncan-Harrelson, 686 F.2d at 1341; Duncan, 24 BRBS at 135; Lozupone v. Lozupone & Sons, 12 BRBS 148, 153 (1979).

When there is insufficient evidence in the record to make a determination of average weekly wage (AWW) under either subsections (a) or (b), subsection (c) is used. Todd Shipyards Corp. v. Director, OWCP, 545 F.2d 1176, 5 BRBS 23, 25 (9th Cir. 1976), aff'g and remanding in part 1 BRBS 159 (1974); Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 104 (1991); Lobus v. I.T.O. Corp., 24 BRBS 137 (1991); Taylor v. Smith & Kelly Co., 14 BRBS 489 (1981). Subsection (c) is also used whenever subsections (a) and (b) cannot reasonably and fairly be applied and therefore do not yield an average weekly wage that reflects the claimant's earning capacity at the time of the injury. Empire United Stevedores v. Gatlin, 936 F.2d 819, 25 BRBS 26 (CRT) (5th Cir. 1991); Walker v. Washington Metro Area Transit Auth., 793 F.2d 319 (D.C. Cir. 1986), cert. denied, 479 U.S. 1094 (1987); Browder v. Dillingham Ship Repair, 24 BRBS 216, 218 (1991).

The Parties disagree about whether Employer paid the proper amount of compensation to Claimant during his periods of temporary total disability. Both Parties agree, however, that Claimant worked for substantially the whole of the year before his June 1999 workplace accident, and that § 10(a) is appropriate. There also appears to be no controversy that Claimant was paid $44,302.67 for 2,618 hours worked during the year. (EB. p. 8). Unfortunately, the evidence does not show exactly how many days Claimant worked during the year. Employer suggests that the total hours worked be divided by eight to determine the number of days worked. However, it is clear from Claimant's wage statement that he was working more than eight hours per day, as he often logged overtime and double time hours as well. (EX. 6, p. 1). Claimant was working an average of 50.35 hours per week. (2,618 / 52). As Claimant worked six days per week, his average number of hours per day was 8.39. (50.35 / 6). Dividing the total hours worked for the year (2,618) by the average number of hours worked per day (8.39) equals 312, the number of days that Claimant worked in the year before his injury.

Accordingly, Claimant's average daily wage was $142. ($44,302.67 / 312). Multiplying Claimant's average daily wage by 300 and dividing by 52 yields an AWW of $819.23. Pursuant to §§ 10(a) and (d), I find that Claimant's AWW in the year preceding his injury was $819.23.

Conclusion

Based on the foregoing findings of fact, conclusions of law and the entire record, I hereby enter the following compensation order. All other issues not decided herein were rendered moot by the above findings.

ORDER

It is hereby ORDERED, JUDGED AND DECREED that:

1. Employer shall pay Claimant temporary total disability benefits from September 27, 1999, to January 1, 2000, and from February 1, 2000, to June 1, 2000, based on an average weekly wage of $819.23.

2. Employer shall receive a credit for benefits and wages paid.

3. Employer shall pay Claimant interest on any accrued unpaid compensation benefits at the rate provided by 28 U.S.C. § 1961, using July 20, 1999, as the date of Employer's knowledge of Claimant's injury.

4. Within thirty days of receipt of this Order, counsel for Claimant should submit a fully-documented fee application, a copy of which shall be sent to all opposing counsel who shall have twenty days to respond.

5. All computations of benefits and other calculations which may be provided for in this Order are subject to verification and adjustment by the District Director.

ORDERED this 4th day of December, 2002, at Metairie, Louisiana.

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LARRY W. PRICE
Administrative Law Judge

LWP:bab